APPEAL NO. 061940
FILED OCTOBER 25, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 23, 2006. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 20%. The parties resolved the issue of the claimant's date of maximum medical improvement (MMI) by stipulating that the claimant reached MMI on April 14, 2005. The appellant (carrier) appealed the IR determination of 20%. The carrier argues that the IR was based on a multilevel spinal surgery that occurred prior to the date of the compensable injury. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached MMI on April 14, 2005; that the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor is Dr. T; that Dr. T assigned a 20% IR; and that the treating doctor, Dr. F initially assigned a 5% IR which he subsequently amended to 20%. After resolving the issue of MMI by stipulation, the only remaining issue in dispute was the claimant's IR. It is undisputed that the claimant underwent a prior multilevel spinal fusion in 2002, prior to the compensable injury. The records reflect that the claimant was injured while trying to keep a co-worker from falling down some stairs. Dr. T noted that the claimant was subsequently diagnosed with pseudoarthrosis and that a CT scan taken on March 4, 2004, revealed displacement of the left L4-5 transpidiculate screws. Spinal surgery was recommended to correct this displacement of the screw and was scheduled. However, the claimant was unable to undergo surgery due to an unrelated health condition. The claimant has since declined surgery because he was concerned about his immune system and its ability to fight infection as a result of the unrelated health condition. The claimant has, as of the date of the CCH, not undergone spinal surgery to correct the displacement of the screw. Dr. F examined the claimant on July 11, 2005, and certified that the claimant reached MMI on that date with a 5% IR utilizing the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. F assessed the 5% IR by placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category II (Minor Impairment). Dr. F subsequently amended his assessment of IR to 20%, stating "upon review of the medical records and physical examination, [the claimant] underwent a multilevel fusion, which is equivalent to 'multilevel spine segment structural compromise' per [Division] Advisory 2003-10, [signed July 22, 2003]. Based on Table 72, [Lumbosacral] DRE Category IV, page 110, [the claimant] is assigned a whole person

impairment of 20% due to this condition." We note that Dr. F certified the date of MMI as July 11, 2005, in his amended certification.

Dr. T examined the claimant on September 15, 2005, and certified that the claimant reached MMI on April 14, 2005, with a 20% IR. Dr. T noted that the claimant did not remember having flexion/extension x-rays prior to his 2002 fusion and that his review of the records did not reveal that any were taken. Dr. T went on to state that he therefore was required to "invoke Advisory 2003-10" and rated the claimant based on Lumbosacral DRE Category IV (Loss of Motion Segment Integrity). Dr. T noted that the issue was how to rate a disrupted prior fusion for a claimant who declines to have that disruption repaired. He stated he was "forced to adhere to Advisory 2003-10." In a response dated October 29, 2005, to a letter of clarification, Dr. T noted that the problem he had in making an impairment determination was that he could find nothing in the Division Advisories or the AMA Guides that addressed impairment based on pseudoarthrotic loss of spinal segment integrity. He reasoned that if an intact fusion gives 20% then it only stands to reason that a broken fusion should generate at least the same impairment, because it is a worsening of the condition. Dr. T acknowledged that it could be argued that the fusion was loosened only at one level and therefore was only a single level injury, although loosening at one level will lead to loosening at the other level, if it had not already done so. In APD 042108-s, decided October 20, 2004, we held that Division Advisories 2003-10 and 2003-10B, signed February 24, 2004, do not require the assignment of an IR based on DRE Category IV if there is a multilevel spinal fusion, but that the Division Advisories must be considered as part of the certifying doctor's process in determining the appropriate IR and that under the Advisories the assignment of an IR based on DRE Category IV for a multilevel spinal fusion is not required but is an option.

We note that Section 408.125(c), effective September 1, 2005, provides that the report of the designated doctor has presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. The preponderance standard in Section 408.125(c) applies to this case because the CCH was held on or after September 1, 2005. The record indicates that Dr. T based his assessment of the claimant's impairment on a multilevel fusion that the claimant had prior to sustaining his compensable injury. Therefore, his IR cannot be adopted because Dr. T assessed impairment utilizing the Division Advisories, when the provision of the Advisories relied on by Dr. T in assessing impairment address a situation in which the claimant underwent a multilevel fusion as a result of the compensable injury. However, in the instant case, the claimant's multilevel fusion was prior to the compensable injury. The claimant now has a "broken fusion" and this situation is not specifically addressed in the Advisories. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. The only other IR in evidence which does not base assessment

of impairment on the multilevel fusion which occurred prior to the claimant's compensable injury is the 5% IR initially assessed by Dr. F. However, that rating was determined based on a different MMI date and therefore cannot be adopted.

Lumbosacral DRE Category IV provides (page 3/102 of the AMA Guides) that loss of motion segment or structural integrity is defined as at least 5 mm of translation of one vertebra on another, or angular motion at the involved motion segment that is 11° more than that at an adjacent motion segment. Loss of structural integrity at the lumbosacral joint is defined as at least 15° more angular motion than at the L4-5 motion segment. No measurements were provided in the evidence admitted at the CCH to determine whether or not the claimant's condition would fall within the criteria as stated for DRE Category IV. We note that the AMA Guides provide that if the physician cannot place the claimant into an impairment category, or if disagreement exists about which of two or three categories to use, the Range of Motion Model (ROM) can be used as a differentiator. In Appeals Panel Decision 030288-s, decided March 18, 2003, the Appeals Panel held that although there are instances when the ROM model may be used, "the use of the [Diagnosis-Related Estimate (DRE)] Model (also known as the Injury Model) is not optional and is to be used unless there is a specific explanation why it cannot be used." In that case the Appeals Panel focused on language from page 3/94 of the AMA Guides that states:

> The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p.108). That model, for instance, would be applicable to a patient with a herniated lumbar disk and evidence of nerve root irritation. If none of the eight categories of the Injury Model is applicable, then the evaluator should use the [ROM] Model.

We remand this case to the hearing officer for him to send a letter of clarification to the designated doctor (if the designated doctor is still qualified), explaining that the doctor cannot assign impairment for a multilevel fusion which occurred prior to the compensable injury under that portion of the Advisories 2003-10 and 2003-10B, which states that a spinal fusion meets a particular DRE category (since the claimant has not had spinal surgery for the compensable injury) but rather must rate the claimant's condition from the compensable injury under the AMA Guides as of the date of MMI, which in this case is April 14, 2005. If the designated doctor is unable to place the claimant in a particular DRE category, he can use differentiators as listed in the AMA Guides, to determine in which DRE category the claimant's compensable injury should be rated. If the designated doctor determines that this is an instance that the DRE Model cannot be used and assesses impairment under the ROM Model, he should give a specific explanation of why the DRE Model cannot be used. The hearing officer should forward any response from the designated doctor to the parties and allow them an opportunity to respond. After the parties have been given an opportunity to respond, the hearing officer should then make a determination of IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the time in which a request for an appeal or a response must be filed.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

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_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge